

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

701 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

One Financial Center  
Boston, Massachusetts 02111  
Telephone: 617/542-6000  
Fax: 617/542-2241

Telephone: 202/434-7300  
Fax: 202/434-7400  
Telex: 753689

Michael B. Bressman

Direct Dial Number  
202/434-7313

May 31, 1996

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By Hand

MAY 31 1996

William F. Caton  
The Secretary  
Federal Communications Commission  
1919 M Street, N. W., Room 222  
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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Dear Mr. Caton:

Enclosed please find an original and seven copies of the Joint Reply Comments of Turner Broadcasting System, Inc., News Corporation, Ltd., and C-SPAN on Further Notice of Proposed Rulemaking.

Please date-stamp one copy and return it to me. Thank you for your assistance in this matter.

Sincerely,

  
Michael B. Bressman

Enclosures

FI/53952.1

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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MAY 31 1996

In the Matter of )  
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Implementation of Sections of the )  
Cable Television Consumer Protection )  
and Competition Act of 1992: )  
Rate Regulation )  
 )  
Leased Commercial Access )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

CS Docket No. 96-60

**JOINT REPLY COMMENTS OF  
TURNER BROADCASTING SYSTEM, INC.,  
NEWS CORPORATION, LTD., AND C-SPAN  
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

Bruce D. Sokler  
Michael B. Bressman  
Mintz, Levin, Cohn, Ferris,  
Glovsky and Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004

Their Attorneys

May 31, 1996

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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JUL 1 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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**JOINT REPLY COMMENTS OF  
TURNER BROADCASTING SYSTEM, INC.,  
NEWS CORPORATION, LTD., AND C-SPAN  
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

Turner Broadcasting System, Inc. ("TBS"), News Corporation, Ltd. ("Fox"), and C-SPAN (collectively, the "Commenters") hereby file these reply comments in the above-captioned Further Notice of Proposed Rulemaking ("Further NPRM"). As the overwhelming number of comments demonstrate, the Commission's proposals would adversely impact subscribers, non-leased access programmers such as Commenters here, and cable operators by undermining the diversity of programming, particularly on the basic and CPST tiers, while providing leased access programmers with unjustified subsidies. This result contravenes both the public interest and the language and intent of the 1984 and 1992 Cable Acts. The Commenters therefore continue to oppose the Commission's proposals in the Further NPRM.

## INTRODUCTION AND SUMMARY

From the initial comments to the Commission's Further NPRM, one can only conclude that this a classic case of the old adage "bad facts make bad law." The Commission has perceived that leased access is being used by only a handful of programmers as a means to provide programming. Looking for a cause for the limited use, the Further NPRM concluded that leased access fees must be too high.

However, the more likely cause was recognized by Congress itself: "[T]he economics of leased access are not conducive to its use."<sup>1/</sup> The business plans of most cable programmers depend on receiving subscription revenues from cable systems. Therefore, for the great majority of networks leased access is at best a last resort, and the limited use that leased access has received is essentially a sign that the marketplace is working, not that it has failed. Instead of recognizing this fact, the Further NPRM proposes a solution that it disavows<sup>2/</sup> and that Congress forbids: have non-leased access programmers and cable operators subsidize leased access programmers. By setting an artificially low, below market-based rate, the Commission would allow leased access programmers who are not economically viable to gain access to cable systems. Worse yet, the Further NPRM proposes an additional subsidy, placing leased access providers on the basic or CPST tier so that they can free ride on the value created and goodwill earned by non-leased access programmers such as the Commenters and cable operators. With such subsidies, numerous leased access

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<sup>1/</sup> S. Rep. No. 92, 102d Cong., 1st Sess., at 31 (1992).

<sup>2/</sup> See Further NPRM ¶ 27.

programming services, particularly home shopping networks and infomercials, will displace non-leased access programmers with programming not valued by subscribers.

These proposals will detrimentally affect the viewing public and cable systems. It is highly likely that less diverse and lower quality programming will be available to consumers, contrary to an express purpose of the 1984 Cable Act. Moreover, because leased access programming will be situated on the basic or CPST tier, consumers will be less inclined to subscribe to this inferior product. Cable operators will be unable to increase subscribership and, more likely, will lose subscribers to DBS and MMDS distributors who would not be burdened by similar restrictions. As a result, both operators and non-leased access programmers, both of whose revenues are directly linked to subscribership levels, will shoulder losses to subsidize leased access programmers. Thus, if the Commission were to adopt new leased access rules, it must do so in a manner that respects market realities and does not undermine Congress's intent.

These are not just our views. The record now contains the opposition of numerous cable programmers who believe that the Further NPRM's proposals would adversely affect them and dramatically affect the nature of the basic and CPST tiers.<sup>3/</sup> Comments filed by cable operators have introduced evidence that affirms that the programmers' fears are not abstract concerns and that demonstrates from the consumer's perspective that the Further

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<sup>3/</sup> See, e.g., Comments of Rainbow Programming Holdings, Inc. on Further Notice of Proposed Rulemaking; Opposition of USA Networks; Comments of the International Cable Channel Partnership, Ltd.; Joint Comments of E! Entertainment Television, Inc., et al.; Comments of Cable Programming Coalition of A&E Television Networks, et al.; Comments of the Travel Channel; Comments of ESPN, Inc.; Comments of the Faith & Values Channel; Comments of Viacom, Inc.; Comments of Discovery Communications, Inc.; Comments of Lifetime Television.

NPRM proposes a solution in search of a problem.<sup>4/</sup> Not surprisingly, these comments coincide with conclusions contained in Stanley Besen's and Jane Murdoch's economic analysis of the Further NPRM's proposals.<sup>5/</sup>

#### **I. THE COMMISSION'S PROPOSALS ARE UNWARRANTED.**

Two of Congress's two main goals in the 1984 Cable Act were to promote a diversity of programming and a diversity of programming sources.<sup>6/</sup> Both of these goals, without question, are currently being and will continue to be met by cable operators and non-leased access programmers. As the Commission's Second Annual Report to Congress Concerning the Status of Competition in the Market for the Delivery of Video Programming<sup>7/</sup> and the Comments<sup>8/</sup> demonstrate, both the number of programming services and unaffiliated programming services have grown substantially since the 1984 and 1992 Cable Acts.

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<sup>4/</sup> See, e.g., Comments of Tele-Communication's, Inc. and Request for Further Reconsideration ("TCI Comments"); Comments of Time Warner Cable ("Time Warner Comments"); Comments of Continental Cablevision, Inc.; Comments of U S WEST; Comments of Cox Communications, Inc.; Comments of Adelphia Communications Corporation, et al.; Joint Comments of Cable Television Operators and Request for Reconsideration; Comments of Comcast Communications, Inc.

<sup>5/</sup> See Stanley M. Besen and E. Jane Murdoch, "The Impact of the FCC's Leased Access Proposal on Cable Television Program Services," May 15, 1996 ("Besen and Murdoch"), attached as Ex. 1 to Joint Comments of Turner Broadcasting System, Inc., News Corporation, Ltd., and C-SPAN on Further Notice of Proposed Rulemaking.

<sup>6/</sup> Communications Act of 1984, §§ 601(2), (4), codified at 47 U.S.C. § 522.

<sup>7/</sup> See In the Matter of the Annual Assessment of the Status of Competition in the Market for Video Programming, Second Annual Report, CS Docket 95-61, FCC 95-491, ¶ 19 & Appendix H (rel. Dec. 11, 1995) ("Second Annual Report").

<sup>8/</sup> See, e.g., TCI Comments at 7; Comments of the National Cable Television Association, Inc. at 4-5 ("NCTA Comments")

Presently, at least 128 national networks provide programming,<sup>9/</sup> a substantial increase over the 68 national services operating in 1992.<sup>10/</sup> More important, numerous new services are being planned, the overwhelming number of which are unaffiliated with any cable operator.<sup>11/</sup> Many of these new services cater to niche groups, attracting a number of subscribers who would not otherwise purchase cable. As the increase in cable subscribership levels indicates,<sup>12/</sup> clearly operators are offering a product that satisfies cable subscribers. In fact, during the 1995-96 television season, cable achieved its highest prime time Nielsen ratings and viewership gains.<sup>13/</sup>

Despite the increase in the diversity of programming, the number of unaffiliated programming services, and the popularity of cable programming, the Further NPRM proposes changing the leased access rules because leased access channels are not being sufficiently used. Though it concedes that there is a difference of opinion as to the cause of the lack of leased access programming, the Further NPRM concludes that too high a leased access rate is to blame.<sup>14/</sup> This conclusion is unjustified.

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<sup>9/</sup> See Second Annual Report ¶ 19.

<sup>10/</sup> See H.R. Rep. No. 628, 102d Cong., 2d Sess., at 41 (1992).

<sup>11/</sup> See TCI Comments at 7; Second Annual Report at Appendix H.

<sup>12/</sup> See Second Annual Report ¶¶ 14-16.

<sup>13/</sup> See "CAB: 95/96 Nielsens Best Ever for Cable. Lowest for Broadcasters," CableFax Daily, May 23, 1996, at 1.

<sup>14/</sup> See Further NPRM ¶ 6 ("The Commission believes that if the maximum rate for leased access is reasonable, the corresponding amount of leased access demand will also be reasonable.").



The Commission simply has posited that the highest implicit fee is unreasonable without any economic analysis. During congressional debate of Section 612, Congressmen Bliley and Wirth discussed the relevance of a lack of use of commercial leased access:

Mr. BLILEY. Some have construed the committee report's explanation of section 612 to suggest that the absence of any commercial users on a system is in itself evidence that the operator's rates, terms, and conditions are unreasonable. Is that interpretation correct?

Mr. WIRTH. Section 612 alllows [sic] cable operators to establish the price, terms, and conditions which at least assure that leased access will not adversely affect an operator's economic position. Indeed, price, terms, and conditions are presumed reasonable absent clear and convincing evidence to the contrary. In view of the flexibility that this section grants an operator to establish rates, terms, and conditions, an operator cannot be found to have acted in bad faith or to have established unreasonable rates simply because parties seeking access choose not to meet the offered rate.<sup>15/</sup>

Though it is now the Commission, not operators, setting the maximum rate, the principle remains the same. Lack of leased access usage does not mean rates are unreasonable,<sup>16/</sup> and rates should be presumed reasonable absent clear and convincing evidence to the contrary. The Commission has made no such showing; in fact, the majority of the initial comments demonstrate the opposite -- the new formula is manifestly unreasonable.

We find it puzzling that the Further NPRM jumps to the conclusion that the lack of use of leased access and the paucity of leased access complaints indicate that the mechanism is faulty, as opposed to the result of natural market forces. In contrast, when reviewing the

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<sup>15/</sup> 130 Cong. Rec. H10441 (daily ed. Oct. 1, 1984) (statements of Reps. Bliley and Wirth).

<sup>16/</sup> The Commission admits but ignores this point: "[A]s long as the maximum leased access rate is reasonable, we believe minimal use of leased access channels would not indicate that the rate should be lowered." Further NPRM ¶ 24.

program access provisions in the 1992 Cable Act, the Commission noted in its First Annual Report to Congress Concerning the Status of Competition in the Market for the Delivery of Video Programming<sup>17/</sup> that few commenters had complained about widespread unavailability of programming, nor had many program access complaints been filed.<sup>18/</sup> From this, the Commission concluded not that there was a problem but that the program access provisions were meeting the goals of the 1992 Cable Act.<sup>19/</sup> Yet, in the current proceeding, the Commission has noted a lack of leased access use and has concluded that there must be a problem. Moreover, like program access there have been few leased access complaints.<sup>20/</sup> If the lack of complaints in the program access context is evidence that the provisions are working properly, the lack of complaints in the leased access context should also suggest that no significant problem exists.

## **II. THE COMMISSION'S PROPOSALS WOULD DECREASE PROGRAMMING DIVERSITY, HARM THE GROWTH AND DEVELOPMENT OF CABLE SYSTEMS, AND ILLEGALLY SUBSIDIZE LEASED ACCESS PROGRAMMERS.**

Consumers purchase basic and CPST tiers, not individual programming services, so that they can obtain a diverse package of high quality programming. At the heart of cable's success over the last decade has been the ability of operators to use their editorial discretion to provide diverse mixes on their tiers to attract and retain subscribers. Being placed on the

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<sup>17/</sup> See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 FCC Rcd. 7442 (1994).

<sup>18/</sup> See id. at 7528 ¶ 173.

<sup>19/</sup> See id. at 7530 ¶ 178; see also Second Annual Report ¶ 160.

<sup>20/</sup> See Time Warner Comments at 8-9; Comments of the Travel Channel at 14-15.

basic or CPST tier with other quality programming services thus is extremely valuable to programmers. It guarantees access to a large base of subscribers, and it increases the opportunity for exposure to viewers who would not normally watch the program service (the "spillover" effect) simply by being clustered with other types of valued programming.

The increase in subscribers has expanded the revenues of cable operators and non-leased access programmers, especially those located on the basic and CPST tiers. More subscribers means more license fees and higher advertising revenues. If changes in an operator's programming mix occur that lessen the attractiveness of the package offered, consumers will choose either not to subscribe in the first instance or to discontinue service. This will result in lower subscriber fees, license fees, and advertising revenues, all of which will negatively impact the financial condition of cable operators and non-leased access programmers.

Besen's and Murdoch's report explains why the Further NPRM's proposals will adversely affect non-leased access programmers and cable operators. According to them, the proposed formula would set a leased access rate at or near zero, causing numerous incumbent programming services to be displaced by primarily home shopping networks and infomercials.<sup>21/</sup> In addition, cable operators would be required to place leased access programmers on the basic or CPST tiers. Such placement has two results: It allows leased access programmers to benefit from the positive spillovers from the remaining non-leased access programmers, and because leased access programming is less valued, it causes the

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<sup>21/</sup> See Besen and Murdoch at 15-17.

value of the entire tier to decrease.<sup>22/</sup> Consumers presented with a less desirable product, according to Besen and Murdoch, will choose to take their business elsewhere. Thus, both cable operators and non-leased access programmers will lose revenues while they subsidize leased access programmers' services.

The initial comments of cable operators and non-leased access programmers support Besen's and Murdoch's analysis. First, cable operators agree that the Commission's proposals will require them to bump existing programming services off to make room for lower quality, less valued leased access programming. For example, TCI has indicated that Headline News, fX, and C-SPAN, each of which is operated by one of the Commenters, would be displaced if the Further NPRM is adopted.<sup>23/</sup> Thus, cable operators would lose the opportunity to provide these types of niche programming services that have helped attract additional subscribers in recent years.<sup>24/</sup> Moreover, the Commenters will witness a substantial decrease in revenues that will detrimentally affect their ability to continue providing and developing high quality, diverse programming.

Second, the initial comments show that non-leased access programming services will be replaced primarily by home shopping networks and infomercials because the economics of leased access greatly favor services that generate revenues from merchandise sales. Even Shop at Home, Inc., a small home shopping network, warns that "if the Commission ignores

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<sup>22/</sup> See id. at 17-20.

<sup>23/</sup> See TCI Comments at 8-9; see also Time Warner Comments at 33-34.

<sup>24/</sup> See Time Warner Comments at 15-16 (noting that the combination of limited channel capacity and leased access prevents it from carrying program services carried by its competitors).

the true value of cable channels and sets the maximum lease rate too low, there will be an excessive expansion in the number of cable channels devoted to direct sales."<sup>25/</sup> This comports with Time Warner's analysis that 68 percent of the leased access programming on its system has been infomercials.<sup>26/</sup> Saturating the cable system with home shopping and infomercials lessens diversity and creates a package that is less attractive to subscribers. Both the surveys conducted by cable operators<sup>27/</sup> and industry reports<sup>28/</sup> indicate that consumers are not interested in or fond of home shopping and infomercials. Understandably, most subscribers in Time Warner's survey also indicated that they would not pay anything for leased access channels.<sup>29/</sup> The current proposals that will replace the diversity of programs subscribers want with more programs they dislike thus will adversely impact the financial condition of cable operators and non-leased access programmers.

Third, the comments of cable operators and non-leased access programmers recognize that requiring placement of leased access programmers on the basic or CPST tiers will

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<sup>25/</sup> Comments of Shop at Home, Inc. at 3.

<sup>26/</sup> See Time Warner Comments at 30.

<sup>27/</sup> See, e.g., TCI Comments at Attachment G; Comments of Continental Cablevision, Inc. at Attachment 2; Time Warner Comments at 30-33.

<sup>28/</sup> See e.g., Elaine Underwood, "Is There a Future for the TV Mall?", Brandweek, Mar. 25, 1996, at 24 (noting that "TV shopping, meaning the shopping networks and infomercials, faces the bleakest future of any of the high-tech channels" and that "the general public is not that intrigued by television shopping").

<sup>29/</sup> See Time Warner Comments at 30-31.

damage the value and attractiveness of these core packages.<sup>30/</sup> Assume a cable system with 101 channels and a 40-channel CPST tier. Under Section 612, 15 channels would be designated for leased access. If the Commission's approach were adopted, those 15 channels would become part of the system's 40-channel CPST package, dramatically changing the attractiveness to customers of the CPST tier. Locating so many home shopping networks and infomercials on these tiers would be like placing Kmart's on Rodeo Drive. The value of the neighborhood would change to such a degree that many customers will choose to go elsewhere.<sup>31/</sup>

Moreover, the changes would cause cable operators and non-leased access programmers to subsidize the activities of leased access programmers.<sup>32/</sup> It is worth repeating that many leased access programmers are not economically viable from a marketplace perspective. Under the Commission's formula, leased access programmers would pay little or nothing instead of market rates to gain access to cable systems.<sup>33/</sup> This subsidy results from the Commission's incorrect assumption that all programming is of equal value in the eyes of subscribers and conclusion that the maximum rate should not compensate for the "speculative" impact lost subscribership would have on the revenues of operators and

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<sup>30/</sup> See TCI Comments at 17-19, 24-25; Comments of Comcast Cable Communications, Inc. at 6; Joint Comments of Cable Television Operators and Request for Reconsideration at 19-20.

<sup>31/</sup> Part-time rates must also be set in manner that will not adversely impact cable operators or non-leased access programmers. A simple prorated formula that does not adequately compensate cable operators for the loss of full-use of a channel must be rejected.

<sup>32/</sup> See Besen and Murdoch at 20.

<sup>33/</sup> NCTA's proposal for an "average" channel rate plus mark-up would help avoid many of the harmful effects of the Commission's formula. See NCTA Comments at 21-24.

non-leased access programmers. The Commission may believe this cost is speculative, but as the operators' surveys have shown, this uncompensated cost is very real. As Time Warner notes in its comments, if "CLA capacity were fully utilized, . . . it could effectively cripple a cable operator."<sup>34/</sup> Leased access programmers also gain a valuable windfall from being placed on the basic or CPST tiers by free riding off of the quality product developed by the operators and non-leased access programmers over many years. This is like telling a copyright holder who risked substantial capital during years of development that now anyone can use its copyright for free; it degrades the value of the product while benefitting the free rider.

In addition to bad policy and economics, the Further NPRM's proposals violate the 1984 Cable Act. As noted in many comments including those submitted by the Commenters, the 1984 Cable Act requires the diversity of sources be achieved "in a manner consistent with growth and development of cable systems"<sup>35/</sup> and that assures that such use "will not adversely affect the operation, financial condition, or market development of the cable system."<sup>36/</sup> Nor was commercial leased access intended to supply free access. As Congress explained:

The term commercial use is employed to distinguish from public access uses which are generally afforded free to the access user, whereas third party leased access envisioned by this section will result from a commercial arrangement between the

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<sup>34/</sup> Time Warner Comments at 16-17.

<sup>35/</sup> Communications Act of 1934, § 612(a), codified at 47 U.S.C. § 532(a).

<sup>36/</sup> Communications Act of 1934, § 612(c)(1), codified at 47 U.S.C. § 532(c)(1).

cable operator and programmer with respect to the rates, terms and conditions of the access use.<sup>37/</sup>

Put another way, "[n]othing in these provisions is in any way intended to deprive a cable operator from receiving a fair profit from the use of this designated channel capacity."<sup>38/</sup>

The Commission's proposals, which would allow cable operators to recover some but not all costs, not only deprive operators of their fair profits but also force them to subsidize leased access programmers. These proposals in their current form must be rejected.

### CONCLUSION

The initial comments amply show that the Further NPRM's proposals are not in the public interest or consistent with Congress's intent because they will decrease programming diversity and will not fully compensate cable operators or non-leased access programmers. Moreover, the proposals will subsidize leased access programmers with extremely low rates and unearned placement on the most valuable programming tiers. Any new leased access regulations must fully compensate cable operators and non-leased access programmers and must not require cable operators to place leased access programmers on tiers.

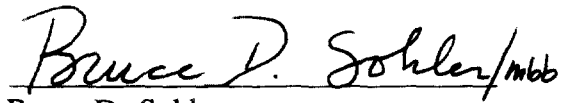
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<sup>37/</sup> H.R. Rep. No. 934, 98th Cong., 2d Sess., at 48 (1984).

<sup>38/</sup> Id. at 52 (emphasis added).



Respectfully submitted,



Bruce D. Sokler  
Michael B. Bressman  
Mintz, Levin, Cohn, Ferris  
Glovsky and Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
202/434-7300

Their Attorneys

May 31, 1996

F1/53556.1

CERTIFICATE OF SERVICE

I hereby certify that I have this 31th day of May, 1996, caused a true and correct copy of the foregoing Joint Reply Comments of Turner Broadcasting System, Inc., News Corporation, Ltd., and C-SPAN on Further Notice of Proposed Rulemaking to be served by hand on the persons listed below:

Honorable Reed E. Hundt  
Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

Honorable James H. Quello  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

Honorable Susan Ness  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554

Honorable Rachelle B. Chong  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

Jackie Chorney  
Office of the Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

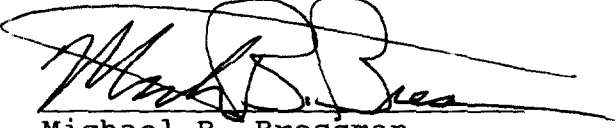
Maureen O'Connell  
Office of Commissioner Quello  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

Mary P. McManus  
Office of Commissioner Ness  
Federal Communications Commission  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554

Suzanne Toller  
Office of Commissioner Chong  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

Meredith Jones, Chief  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Room 918  
Washington, D.C. 20554

Lynn Crakes  
Policy and Rules Division  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Room 404F  
Washington, D.C. 20554



Michael B. Bressman